Editor's note: 96 I.D. 239; Appealed -- aff'd sub nom. State of New Mexico ex rel. Energy Minerals Resources Dept. v. Lujan, Civ.No. 89-0758M (D.NM Feb. 14, 1994)

VALENCIA ENERGY CO., ET AL.

IBLA 87-176 Decided May 26, 1989

Appeal from a decision of the Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement, determining that certain lands were "Indian lands" within the meaning of the Surface Mining Control and Reclamation Act of 1977.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Supervised by an Indian tribe." As used in sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1291(9) (1982), land is "supervised by an Indian tribe" where an Indian tribe owns either the mineral estate, the surface estate in fee, or both.

APPEARANCES: Geoffrey L. Denempont, Esq., Tucson, Arizona, for Valencia Energy Company; Gordon Venable, Esq., Santa Fe, New Mexico, and A. Raymond Randolph, Esq., Washington, D.C., for the New Mexico Energy and Minerals Department; Paul E. Frye, Esq., Albuquerque, New Mexico, for the Navajo Tribe of Indians; Joseph M. Oglander, Esq., Office of the Solicitor, U.S.

Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Valencia Energy Company (Valencia) and the State of New Mexico Energy and Minerals Department (EMD) have appealed from a decision of the Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement (OSMRE), dated October 20, 1986, finding that the proposed Gallo Wash mine was located on "Indian lands," within the meaning of section 701(9) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1291(9) (1982). The effect of this determination was to make the pro-posed Gallo Wash mine subject to the Federal Program for Indian lands. See 30 CFR Part 750. The Navajo Tribe of Indians (Navajo Tribe/Tribe) has intervened in this appeal, 1/ generally supporting the position of OSMRE that the lands involved are "Indian lands" within the meaning of SMCRA.

The proposed Gallo Wash mine is located on approximately 16,000 acres of land in T. 21 N., Rs. 8 and 9 W., New Mexico Principal Meridian, in San Juan County, New Mexico. With the exception of sec. 16, T. 21 N., R. 9 W., all of the land involved was originally patented to the Santa Fe Pacific Railroad (Santa Fe) in 1923 and 1934, apparently under the provisions of the Act of March 3, 1921, 41 Stat. 1225. In 1949, the subject

1/ By Order dated Feb. 2, 1987, this Board ruled, inter alia, that the Navajo Tribe was a proper party to the instant appeal. See 43 CFR 4.1284(a).

land was included in a conveyance by Santa Fe to the Chaco Land and Cattle Company (Chaco), subject to the reservation of

> all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found, upon or under said lands, with the right
> to prospect for, mine and remove the same, and to use so much of the surface of said lands as shall be necessary and convenient for shafts, wells, tanks, pipe lines, rights of way, railroad tracks, storage purposes, and other and different structures and purposes necessary and convenient for the digging, drilling and working of any mines or wells which may be operated on said lands.

(Warranty Deed, dated Aug. 16, 1949, at 4). An express provision for compensation for any use of the surface was also included. By warranty deed dated December 4, 1958, Chaco conveyed the land at issue, together with other described parcels, to the Navajo Tribe, subject to all easements, reservations, and exceptions of record. Thus, the Navajo Tribe is presently the owner in fee of the surface estate of the land.

Santa Fe subsequently leased its coal rights to the Gallo Wash Coal Company, which, in turn, subleased these rights to the Tucson Electric Power Company (TEP) in 1977. In 1984, TEP assigned its rights to Valencia, a wholly owned subsidiary of TEP. Prior to this assignment, Alamito Coal Company (Alamito), at that time another wholly owned subsidiary of TEP, negotiated an agreement with the Navajo Tribe with respect to the use of
the surface of the land. This agreement recognized the Navajo Tribe as the owner of the surface in fee simple and Alamito as the holder of the reserved rights with respect to the coal located in the land. In substance, this agreement provided for the payment of $1,250,000 to the Navajo Tribe:

> for the exclusive right and possession of the aforesaid described land, to supervise, manage and use the land described herein including but not limited to the right to mine coal by surface methods, to construct roads, railroad spur, coal washing facilities, loading facilities, buildings[,] maintain coal storage piles, to operate a railroad, motor vehicles, heavy equipment including front end loaders, drag lines, dozers, to use explosives and in general to do all things and to make such use of the land described herein as is customary in the mining of coal by surface methods.

(Memorandum of Agreement, dated Feb. 5, 1980, at 2). In 1984, Alamito's rights under this agreement were assigned to Valencia.

It should also be noted, in view of one of the arguments pressed by the Navajo Tribe, that the land in question was part of a large parcel of land included in Executive Order No. 709. Under Exec. Order No. 709, which was issued by President Theodore Roosevelt on November 9, 1907, approximately 1,900,000 acres of land were "withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the present Navajo Reservation." This withdrawal was subsequently modified on January 28, 1908, by Exec. Order No. 744 in order to resolve a conflict between the lands included in Exec. Order No. 709 and lands included as an addition to the Jicarilla Indian Reservation by Exec. Order No. 711, dated November 11, 1907.

Subsequent to these Executive orders, Congress enacted the Act of May 29, 1908, 35 Stat. 444. Section 25 of that Act provided that

> whenever the President is satisfied that all the Indians in any part of the Navajo Indian Reservation in New Mexico and Arizona

> created by Executive orders [Nos. 709 and 744] have been allot-ted, the surplus lands in such part of the reservation shall be restored to the public domain and opened to settlement and entry by proclamation of the President.

Pursuant to this Act, a number of allotments were made, though the Navajo Tribe strongly asserts that significant numbers of Navajos failed to receive allotments. 2/ In any event, on December 30, 1908, President Roosevelt issued Exec. Order No. 1000 which restored various unallotted lands within the limits of Exec. Order No. 709 to the public domain. Finally, on January 16, 1911, President Taft issued Exec. Order No. 1284, which provided that "all lands not allotted to Indians or otherwise reserved by Executive orders [Nos. 709 and 744], lying west of the first guide meridian west, be and the same hereby are restored to the public domain." 3/

It is the position of the Navajo Tribe that, notwithstanding the foregoing, the boundaries of the Navajo Reservation, as established by Exec. Order Nos. 709 and 744, have never been diminished. Thus, it argues that the land in question is within the exterior boundaries of the Navajo Reservation. The relevancy of this assertion to the issue under appeal is explored infra.

2/ See Affidavit of Herbert C. Stacher, attached as Exhibit A to Memorandum dated Oct. 2, 1984, entitled "Jurisdiction over P & M South Mine, Crownpoint Mine, and Gallo Wash Mine - Opinion."

3/ Since Exec. Order No. 1000 had restored all lands east of the First Guide Meridian to the public domain, with the exception of 110 specified pending allotment applications, Exec. Order No. 1284, when read in conjunction with Exec. Order No. 1000, effectively restored all lands which had been withdrawn by Exec. Orders Nos. 709 and 744 to the public domain except for the lands embraced in any of the 110 allotments expressly excepted from Exec. Order No. 1000 and which were located east of the First Guide meridian. See Navajo Tribe of Indians, 82 IBLA 387 (1984); Tenneco Oil Co., 8 IBLA 282 (1972).

Under the structure of SMCRA, any parcel of land is subject to one of three possible classifications. First, it could be "Federal land." As defined in SMCRA, "Federal lands" means "any land, including mineral interests, owned by the United States * * *, except Indian lands." 30 U.S.C. | 1291(4) (1982) (emphasis supplied). "Indian lands" are defined as "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. | 1291(9) (1982). All other lands, that is, all lands which are not properly classified as either "Federal lands" or "Indian lands," are, by definition, "lands within any State." 30 U.S.C. | 1291(11) (1982).

As enacted by Congress, SMCRA envisioned a regulatory system in which states would be permitted to exercise primary authority for the enforcement of the Act. Accordingly, the Act provided that any state which desired to assume exclusive jurisdiction over the regulation of surface coal mining on "non-Federal lands" within the State could submit a state program 4/ to the Secretary of the Interior for his approval. 30 U.S.C. | 1253 (1982). With

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4/ While use of the phrase "non-Federal lands," may be problematic with respect to "Indian lands," in that SMCRA expressly excludes "Indian lands" from the definition of "Federal lands," it is clear that state primacy does not attach to any lands properly deemed to be "Indian lands" under the regulatory definition. Thus, "State program" is defined as a program established under 30 U.S.C. | 1253 (1982) to regulate surface mining activities on "lands within such State." 30 U.S.C. | 1291(25) (1982). Since the statutory definition of "lands within such State" expressly excludes Indian lands, there can be no question that State primacy does not attach to "Indian lands." See also 30 CFR 731.12 and Part 750. Appellants herein do not contend otherwise. Rather, they argue that the lands at issue are not properly defined as "Indian lands."

regard to "Federal lands," Congress determined that surface mining activities would, as a general matter, be subject to a Federal lands program. At the same time, however, Congress expressly provided that any state with an approved state program could enter into a cooperative agreement with the Secretary to provide for State regulation of surface coal mining operations on Federal lands within that state. 30 U.S.C. | 1273(c) (1982).

But, while states could, under these provisions, achieve primacy both for "lands within such State" and "Federal lands" within the state, Congress expressly precluded the States from regulating surface coal mining activities occurring on "Indian lands" located within the State. Indeed, cognizant of the special problems involved with the regulation of surface mining on "Indian lands," Congress authorized a study which would "include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." 30 U.S.C. | 1300(a) (1982). But, until such time as Congress acted pursuant to the report, the Secretary of the Interior was required to enforce the standards of the Act. See In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1363-65 (D.C. Cir. 1980). Accordingly, regulations have been adopted which establish a Federal program for Indian lands. See 30 CFR Part 750.

With respect to the State of New Mexico, we note that the New Mexico State Program was conditionally approved on December 31, 1980 (see 30 CFR 931.10), and, subsequent thereto, the State and the Department of the Interior entered into a cooperative agreement with respect to "Federal

lands" within the State. See 30 CFR 931.30. Thus, so long as lands located in the State of New Mexico are not "Indian lands" within the meaning of 30 U.S.C. | 1291(9) (1982), the State of New Mexico has primary responsibility for regulation of surface coal mining operations.

The initial regulatory definition of "Indian lands," published in 1979, did nothing more than replicate the statutory language. See 44 FR 14901, 15314 (Mar. 13, 1979). However, on September 28, 1984, the Department promulgated regulations establishing the Federal Program for Indian Lands. See 49 FR 38462. While the definition of "Indian lands," was not altered, the preamble to the regulations provided that "OSM[RE] will continue to regulate as Indian land all land within the exterior boundary of Indian reservations, allotted lands, and all lands where either the surface or minerals are held in trust for or supervised by an Indian tribe of individual Indians." 49 FR 38463 (Sept. 28, 1984).

Subsequent to the promulgation of the regulations establishing the Federal Program for Indian Lands, a number of challenges, including one by the State of New Mexico, were brought in Federal court. The New Mexico suit was settled under an agreement in which the Department agreed to issue a clarification of the regulatory preamble in which the Department would disclaim any assertion that all individual allotments outside of the exterior boundaries of an Indian reservation were "Indian lands" within the contemplation of SMCRA. 5/ For its part, New Mexico agreed that it would not

5/ While EMD asserts that the agreement reached resulted in a finding that all allotments were excluded from the definition of "Indian lands," it is the view of the Department of Justice that whether or not any specific

contest the Secretary's assertion of exclusive authority over "Indian lands" within the State. See New Mexico v. United States, Civ. No. 84-3572 (D.D.C. 1984). It should be noted that, except for the question of individual Indian allotments, this settlement did little to advance a resolution of the scope of the statutory definition.

Responding to a request from the Albuquerque Field Office for clarification of the OSMRE policy with respect to Indian lands, in light of the settlement of the New Mexico suit, the Acting Director, OSMRE, issued a memorandum, dated September 27, 1985, in which he attempted to provide some guidance. With respect to fee land, the Director noted that "[b]ecause such lands are 'supervised by' the tribe, they would consequently fall within the statutory definition of 'Indian lands' at section 701(9) of the Act, and are subject to Federal regulatory authority."

Further clarification was provided by the Assistant Director, Western Field Operations, OSMRE, who, by memorandum dated March 19, 1986, advised the Director of the Albuquerque Field Office that tribal fee lands "are SMCRA definition of 'Indian lands' and OSMRE would be the regulatory authority." The Assistant Director cautioned, however that "if it were determined that such lands are not supervised by an Indian tribe, then these lands presumed to be supervised by the tribe and would fall within the statutory

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fn. 5 (continued)
Indian allotment is within the "Indian lands" definition of 30 U.S.C.
| 1291(9) (1982) of SMCRA depends on whether the allotment can be deemed to be "held in trust for or supervised by an Indian tribe." See Exh. T to Navajo Tribe's Answer (II). This position has also been embraced by OSMRE. See 53 FR 3993 (Feb. 10, 1988).

would be regulated by the state." This latter determination, the Assistant Director noted, could only be made on a case-by-case basis.

In April 1986, having been apprised of the Assistant Director's memorandum, Valencia sought a determination that the land on which it proposed to conduct surface coal mining operations was not "Indian land." Pursuant to a request by the Director, Albuquerque Field Office, both Valencia and the Navajo Tribe submitted written position papers.

In his October 20, 1986, decision, the Director, Albuquerque Field Office, concluded that the lands in question were "Indian lands" for the purposes of SMCRA. In making this determination, the Director did not assert that the lands were within the Navajo Reservation or were held in trust for the Navajo Tribe. Rather, he concluded that the lands were "supervised by an Indian tribe" within the meaning of the statutory definition of "Indian lands."

The Director supported his interpretation on two bases. First, he noted that ordinary usage would support a conclusion that land "owned" by the Tribe necessarily constituted land "supervised" by the Tribe. Thus, he argued that "if ownership were not supervision, it would be impossible for a property interest to reach the level of supervision."

As a second reason for interpreting ownership to necessarily include the concept of supervision, the Director turned to the legislative history of the Land Use Policy Planning and Assistance Act of 1973 (LUPA), which

contained a similar definition of "Indian lands" and which was drafted approximately at the same time that the SMCRA definition of "Indian lands" was drafted. 6/ In explaining the scope of the phrase "supervised by an Indian tribe" in LUPA, it was noted that:

> [T]he second part [of] the definition, which includes "all lands held in trust [for] or supervised by any Indian tribe," is intended to cover lands which are Indian country for all practical purposes but which do not enjoy reservation status. The Committee recognizes that Indian tribal land use planning processes and programs would be largely meaningless if the tribes could not control key tracts within their reservations which they did not own or lands outside a reservation which they own or for which they possessed administrative responsibility. [Emphasis supplied.]

S. Rep. No. 197, 93d Cong., 1st Sess. 127 (1973). The Director concluded, therefore, that lands owned by an Indian tribe are "Indian lands" within the purview of section 701(9) of SMCRA.

The Director also rejected an argument advanced by Valencia that the Tribe's lease of the premises vitiated the character of the land as "Indian land" for the purpose of SMCRA. The Director concluded that "nothing in this conveyance suggests that the Tribe has given up its underlying authority over the land," and that "[t]he 'supervision' conveyed to Valencia is less than the Tribe's full supervisory authority" (Decision at 3). Accordingly, he determined that the proposed Gallo Wash mine was located on Indian lands and, hence, subject to the Federal Program for Indian Lands. As noted above, both Valencia and EMD have appealed from this determination.

6/ Recourse to this legislative history was justified on the ground that the legislative history of SMCRA did not specifically address the meaning of the phrase "supervised by an Indian tribe" (Dec. at 2).

Both Valencia and EMD challenge the conclusion of OSMRE that lands which are owned by an Indian tribe, outside the exterior boundaries of an Indian reservation, are "Indian lands" for the purposes of SMCRA. Valencia argues that the Director's reliance on the legislative history of LUPA as an aid in the interpretation of the phrase "supervised by an Indian tribe" appearing in SMCRA is misplaced since LUPA was never enacted into law and SMCRA, itself, was not adopted until 4 years after LUPA had been considered. See Valencia Statement of Reasons (SOR) at 3.

Moreover, Valencia argues that an interpretation of the phrase "supervised by an Indian tribe" which includes land owned by the Navajo Tribe outside the reservation boundaries conflicts with section 710(h) of SMCRA, 30 U.S.C. | 1300(h) (1982), which provides, inter alia, that "nothing in this chapter shall change the existing jurisdictional status of Indian Lands." Since the lands in question are not presently within the Tribe's regulatory jurisdiction, Valencia contends that it is beyond the power of OSMRE to include such lands within the definition of "Indian lands."

Additionally, Valencia argues that, as a practical matter, inclusion of lands owned by Indian tribes in their proprietary capacity within the SMCRA definition of "Indian lands" would create great uncertainties in the operation of SMCRA. Thus, the acquisition by an Indian tribe of a surface estate could, during the course of mining, serve to remove the operation from the purview of an approved state program and require the operator to go through an entirely new permitting process. Thus, Valencia points out that "[p]ermitting tribal ownership of interests in off-reservation land to be

determinative of tribal jurisdiction over surface mining activities places the owner of the mineral estate in a position where it potentially must answer to various regulatory agencies during the course of surface mining activities" (Valencia SOR at 4).

As a second ground for reversal of the decision of the Director, Albuquerque Field Office, Valencia assails his conclusion that the agreement between Valencia and the Navajo Tribe, entered into on February 5, 1980,

did not deprive the Tribe of supervisory authority over the land. Valencia asserts that the Director was wrong in his assertion that the agreement covered only use of the surface estate for the purpose of coal mining, noting that the agreement expressly granted Valencia the exclusive use and supervision of the land, "including but not limited to" the right to mine coal by surface mining methods. Valencia contends that the Navajo Tribe

has conveyed all of its rights to the surface for a period of approximately 50 years and that, under the agreement, the Navajo Tribe has no supervisory authority over the land until the expiration of the lease term. See Valencia SOR at 7-8.

EMD has also appealed from the decision of the Director, Albuquerque Field Office. In addition to the arguments made by Valencia, EMD contends that the decision should be vacated because it violates the procedural requirements of SMCRA. Thus, EMD notes that it originally issued a permit to Valencia for the proposed Gallo Wash mine in 1978. In 1981, the permit application under New Mexico's permanent program was duly published as provided for by 30 U.S.C. | 1263(a) (1982). EMD points out that 30 U.S.C.

| 1263(b) (1982) grants a 30-day period in which any person, including the head of any Federal agency, having an interest which is or may be adversely affected may file an objection to the permit application. EMD further notes that neither the Navajo Tribe nor the Director of OSMRE's Albuquerque Field Office filed any objections to the permit application. Thus, EMD contends that both OSMRE and the Navajo Tribe are effectively estopped from challenging the permit which it issued to Valencia. See EMD SOR at 6-8.

While in agreement with the substantive arguments made by Valencia,

EMD amplified the argument that OSMRE's interpretation was contrary to the expressed congressional intent in maintaining the jurisdictional status quo. EMD notes that the Conference Committee explained its rejection of a Senate version which would have expanded tribal authority on the ground that the conferees "did not want to change the status quo with respect to jurisdiction over Indian lands both within and outside the reservation boundaries." See H. Conf. Rep. No. 95-493, 95th Cong., 1st Sess. 114 (1977). Thus, EMD contends that "[t]he critical question with respect to the Gallo Wash Mine * * * concerns the existing jurisdictional status of the lands in question." EMD argues that since, under existing law, the State of New Mexico exercises criminal and civil jurisdiction over the lands involved, maintenance of the jurisdictional status quo compels the conclusion that EMD is the proper regulatory authority with respect to the proposed Gallo Wash mine. 7/

7/ We note, in passing, that a key predicate of EMD's theory was that Congress "borrowed" from the concept of "Indian country," as defined in 18 U.S.C. | 1151 (1982), in defining "Indian lands." See EMD SOR at 12-14. EMD, however, offers no textual or other support for this assertion. Paradoxically, the only support for this contention comes from the legislative history of LUPA, which both EMD and Valencia assert is irrelevant to the question before us.

EMD also argued that, under the literal terms of the definition of "Indian lands" appearing at 30 U.S.C. | 1291(9) (1982), the proposed

Gallo Wash mine cannot be said to be within the scope of the definition. Thus, EMD notes that Congress defined "Indian lands" to encompass "all

lands including mineral interests * * * supervised by an Indian tribe."

EMD asserts that, since the Navajo Tribe does not own the mineral estate beneath the subject lands, these lands cannot be deemed "Indian lands," because, according to EMD's interpretation, only lands in which the Tribe owns the surface and the mineral estate can be brought within the statutory definition.

Both the Navajo Tribe and OSMRE have responded to the arguments presented by Valencia and EMD. OSMRE reiterates the arguments expressed by the Director, Albuquerque Field Office. In particular, with respect to whether the Navajo Tribe "supervises" the land, OSMRE notes, inter alia, that the Tribe's interest in the land will be whole at the conclusion of mining and argues that "[i]t is this interest in the land at the conclusion of mining which dictates which program applies" (OSMRE Answer at 8). Indeed, OSMRE argues that "the Tribe's remaining interest was significant in determining that the lands are Indian lands" precisely because "SMCRA is intended to assure post mining protection of the land." Id.

OSMRE also strongly takes issue with appellants' assertion that the legislative history of LUPA is irrelevant to the interpretation of "Indian lands" in SMCRA. Thus, OSMRE notes that both were prepared by the same Senate committee, both contained identical definitions of "Indian lands,"

and both dealt with land-use control and planning. While admitting that numerous changes were made between 1973 and 1977 when SMCRA was finally adopted, OSMRE also points out that no changes were made in the definition of "Indian lands."

Finally, OSMRE argues that there is nothing inconsistent between the desire of Congress not to effect any changes in the jurisdictional status of Indian lands and the interpretation of OSMRE that "Indian lands" under SMCRA includes land owned by an Indian tribe outside of the exterior boundaries of a reservation. Thus, OSMRE contends it is entirely in keeping with the expressed desire to postpone resolution of the jurisdictional status of "Indian lands" for Congress to, in the interim, determine that the States could not exercise authority under SMCRA on "Indian lands," including lands owned by an Indian tribe outside of reservation boundaries. See OSMRE Answer at 10-12.

With regard to the contention of EMD that the statutory definition of "Indian lands" must be construed as requiring tribal ownership of both the surface and mineral estate of lands outside reservation boundaries, OSMRE notes that what little legislative history that does exist supports the conclusion that the phrase "including mineral interests" was added to remove any doubt that the term land would include ownership of the mineral estate. 8/ OSMRE also attacks EMD's assertion that OSMRE was estopped from

8/ Thus, OSMRE refers to a colloquy between Congressman Melcher of Montana and Congressman Udall of Arizona, Chairman of the House Committee on Interior and Insular Affairs:

"Mr. Melcher: [B]y inserting the words 'including mineral interests' in reference to lands held in trust or supervised by an Indian tribe. It

asserting jurisdiction over the proposed Gallo Wash mine because it had failed to participate in the state permitting proceeding, contending that EMD had not established the necessary elements to effect an estoppel under the criteria set forth by the Interior Board of Surface Mining and Reclamation Appeals in Mountain Enterprises Coal Co., 3 IBSMA 338, 347, 88 I.D. 861, 866 (1981).

For its part, the Navajo Tribe is generally supportive of the position of OSMRE that the land within the proposed Gallo Wash mine area may be deemed to be "Indian land" because the Tribe "supervises" it. In furtherance of the expansive reading which OSMRE has applied to the term "supervised," the Navajo Tribe points out that, in Montana v. Clark, 749 F.2d 740 (D.C. Cir. 1985), cert. denied, 474 U.S. 919 (1985), the court expressly noted that: "Rather than indicating a finely tuned calibration designed to differentiate among the various kinds of Indian lands, the overwhelming evidence suggests Congress' desire temporarily to postpone determining the locus of regulatory authority over all lands in which Indians have an interest." Id. at 752 (emphasis supplied).

We note, however, that in one important respect, the Navajo Tribe's analysis on this point differs from that of OSMRE. Thus, the March 19, 1986, memorandum from the Assistant Director, Western Field Operations, OSMRE, expressly noted that the question of supervision was one of fact,

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fn. 8 (continued)
was the purpose of this amendment to clarify the term 'land' so that it would be given its normal meaning to include mineral estates.

"Mr. Udall: The gentleman is correct. That is correct."

121 Cong. Rec. H13377 (May 7, 1975).

determinable only on a case-by-case basis. The Navajo Tribe, on the other hand, argues, in effect, that "supervision" within the meaning of 30 U.S.C

| 1291(9) (1982) is a question of law, since, in the Tribe's view, owner-ship of either the surface fee or the mineral estate necessarily confers "supervision" under the statutory definition. See Navajo Tribe Answer (II) at 9-10.

In addition to supporting OSMRE's conclusion that the land in question is "supervised by an Indian tribe" within the meaning of 30 U.S.C. | 1291(9) (1982), the Navajo Tribe also takes the position that, independent of this question, the land should be deemed to be "Indian land" within the meaning of SMCRA because it is within the exterior boundaries of the Navajo Reservation. Relying on decisions such as Solem v. Bartlett, 465 U.S. 463 (1984), and Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986), the Navajo Tribe argues that, in the absence of specific language showing an intent to diminish the boundaries of the reservation or legislative history evincing "substantial or compelling evidence of a congressional intent to diminish" (see Solem v. Bartlett, supra at 472), the Act of May 29, 1908, supra, pursuant to which Presidents Roosevelt and Taft issued Exec. Order Nos. 1000 and 1284, respectively, cannot be said to have effected a diminution of the Navajo Reservation. See Navajo Tribe Answer (I) at 14-21.

Based on the foregoing, it is clear that the primary question pre-sented by this appeal is whether the land within the proposed Gallo Wash minesite is "supervised by" the Navajo Tribe within the meaning of 30 U.S.C.

| 1291(9) (1982), and thus subject to regulation by OSMRE pursuant to the Federal Program for Indian Lands. If this question is decided in the negative, it then becomes necessary to examine the Navajo Tribe's contention that the land is nevertheless subject to OSMRE's jurisdiction because it is within the exterior boundaries of the Navajo Reservation. Before turning to these questions, however, we wish to briefly address the contention of EMD that both OSMRE and the Navajo Tribe are estopped from challenging the State's assertion of jurisdiction because of the failure of either entity to participate in Valencia's permit application process under the New Mexico permanent program.

As noted above, EMD argues that, since both OSMRE and the Navajo Tribe failed to protest the assertion of EMD jurisdiction in the issuance of a permit to Valencia in 1981, they both are, in effect, collaterally estopped from asserting a lack of State jurisdiction in another forum. We cannot agree.

Both the Navajo Tribe and OSMRE argue that appellant EMD has completely failed to establish the elements necessary to establish estoppel against the Government, as delineated by prior decisions of the Department. See, e.g., Gabriel Energy Corp. v. OSMRE, 105 IBLA 53 (1988); Ptarmigan Co., 91 IBLA 113 (1986); Mountain Enterprises Coal Co., supra. Respondents are clearly correct in their assertions on this point. Moreover, since the essence of the question before the Board goes to the jurisdictional authority of EMD to approve Valencia's permit application, it is doubtful if estoppel could ever apply in such circumstances since, if the Navajo Tribe and OSMRE are

correct, EMD lacked subject matter jurisdiction over the permit application and the approval of Valencia's permit application would be ultra vires and directly in conflict with its approved State program. 9/

Thus, the question which must be decided is whether the lands in question are "Indian lands," within the statutory definition of SMCRA. The key to this determination in turn depends on analysis of the phrase "supervised by an Indian tribe," a phrase which is, itself, neither defined in the statute nor explained in the legislative history of SMCRA.

As noted above, both OSMRE and the Navajo Tribe argue that ownership of either the surface fee or the mineral estate necessarily subsumes the concept of "supervision." Thus, the decision of the Director, Albuquerque Field Office, opined that "if ownership were not supervision, it would be impossible for a property interest to reach the level of supervision." The Navajo Tribe concurs in this assessment. Both OSMRE and the Tribe draw support from the legislative history of LUPA and the Navajo Tribe further argues that the Court of Appeals decision in Montana v. Clark, supra, bolsters this interpretation. Valencia and EMD dispute this interpretation,

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9/ Indeed, in approving the New Mexico State program, the Department noted that a number of groups had expressed concern as to the applicability of the New Mexico State program to Indian lands outside of reservation boundaries. In response to requests that OSMRE obtain a specific disavowal of jurisdiction by the State with respect to such Indian lands, the Department declared:

> "The Secretary has explicitly stated in his findings that the approval contained in 30 CFR 931.10 is limited to non-federal and non-Indian lands in the State of New Mexico. The Secretary's approval in no way acts to grant or endorse any assertion by New Mexico of jurisdiction over mining on Indian lands."

45 FR 86482 (Dec. 31, 1980).

arguing that the legislative history of LUPA is irrelevant to the meaning of the phrase "supervised by an Indian tribe" in the context of SMCRA. Further, EMD seeks to distinguish the decision in Montana v. Clark, supra, by noting that it involved a discrete question, i.e., the distribution of Abandoned Mine Reclamation Funds under Title IV of SMCRA. For reasons which we will set forth, we find ourselves in substantial agreement with respondents and, accordingly, affirm, as modified herein, the determination of OSMRE that the lands in question are "Indian lands," within the contemplation of the Act and therefore subject to the Federal Program for Indian Lands.

[1] All parties to this appeal admit that the phrase "supervised by an Indian tribe," is not a term of art to which can be ascribed a settled meaning, free of dispute. Rather, the present controversy swirls around the attempt by OSMRE to flesh out the meaning of this nebulous expression. 10/ In this regard, both OSMRE and the Navajo Tribe draw support from the legislative history surrounding similar language in LUPA. Certainly, an interpretation of the phrase "supervised by an Indian tribe," which embraced lands outside of a reservation which a tribe "own[ed] or for which they possessed administrative responsibility," would almost certainly compel a conclusion that the lands in question are "Indian lands" not subject to the State program.

10/ Nowhere are the difficulties attendant to deciphering the meaning of this phrase more apparent than in the failure of either EMD or Valencia to propose a substitute interpretation of the statutory language. Thus, while both appellants argue strenuously that OSMRE's interpretation is wrong, neither appellant proffers any other interpretation.

Valencia and EMD argue that recourse to the legislative history of LUPA is unwarranted because it involves a different piece of legislation, one

which was never enacted into law and which was considered 4 years before SMCRA was adopted. But, as the respondents point out, LUPA was considered by the same committee which was at that time in the process of formulating an earlier version of SMCRA, the definition of "Indian lands" in both bills was identical, and, despite the fact that numerous substantive provisions of SMCRA were changed in the ensuing 4 years, the definition of "Indian lands"

remained the same. It is simply logical to assume that a single legislative committee, reviewing two separate pieces of legislation, both containing the same verbatim definition, intended the same interpretation of that definition to be applied with respect to both pieces of legislation.

Admittedly, the language of the statutory definition was fashioned

by the 93d Congress and SMCRA did not become law until it was passed by the 95th Congress and signed by President Carter in 1977. Thus, appellants contend that, regardless of what may have been contemplated by the original drafters of the statutory language, their interpretation cannot be said to be binding on the 95th Congress. This argument would have more force if there was any affirmative indication in the subsequent legislative history of a different interpretation. No such manifestation exists. On the contrary, as the court in In re Surface Mining Regulation Litigation, supra, noted: "The statutory provisions with respect to Indian lands were fashioned in the 93d Congress and were carried forward, with continual reexamination but without significant change, into the Act." Id. at 1364 (emphasis supplied). Indeed, it was precisely because of this fact that the Court

placed heavy reliance on the legislative history of the 1973 proposal in interpreting the meaning and scope of section 710 of SMCRA, 30 U.S.C. | 1300 (1982), as adopted in 1977. We therefore agree with OSMRE and the Navajo Tribe that recourse to the legislative history of LUPA for the purpose of ascertaining the meaning of the phrase "supervised by an Indian tribe," as it appears in 30 U.S.C. | 1291(9) (1982), was proper.

Moreover, we agree with the Navajo Tribe that the decision in Montana v. Clark, supra, lends additional support to the conclusion reached by OSMRE. EMD attempts to discount the relevancy of this decision, placing particular reliance on a statement by the court that "[w]e wish to make clear that our decision is limited to the narrow question presented by this case, the rationality of a regulation providing for distribution of reclamation funds." 749 F.2d at 747 n.14. Indeed, EMD asserts that the decision did not "decide whether the ceded strip in Montana constituted 'Indian lands' so that State regulatory authority was ousted" (EMD SOR at 19). To the extent that EMD is arguing that the court did not hold that the ceded strip was "Indian lands" removed from state regulation under 30 U.S.C. | 1253 (1982), EMD is technically correct since that issue was not before the court. But, to the extent that EMD is contending that the court did not determine that the ceded strip was "Indian lands" within the statutory definition appearing at 30 U.S.C. | 1291(9) (1982), EMD is patently wrong.

As noted above, the decision in Montana v. Clark, supra, involved the question whether OSMRE correctly withheld from the State of Montana an allocation from the Abandoned Mine Reclamation Fund for fees paid by mines

located on the "ceded strip," a 1.13 million-acre tract in Montana, ceded by the Crow Tribe to the United States under a 1904 treaty, but for which the Crow Tribe retained a beneficial interest in the coal deposits. The operative statutory provision, 30 U.S.C. | 1232(g)(2) (1982), provided that "[f]ifty per centum of the fund collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary * * *." In adopting regulations implementing this provision, the Secretary substituted the term "Indian lands" for "Indian Reservation." Montana argued that the effect of this alteration was to enlarge the statutory term "Indian Reservation" to include off-reservation lands, such as the ceded strip, which were covered by the statutory definition of "Indian lands" but which could not be deemed to be within an "Indian Reservation," and thereby prevent the State from receiving an allocation of the fees paid by mining operations thereon. 11/

In affirming the actions of OSMRE, the court expressly noted that "the parties do not seriously dispute that the ceded strip qualifies as 'Indian land' as defined by the statute." Id. at 743. Indeed, Montana's entire basis for standing rested on the fact that, but for the alteration of the definition to include off-reservation lands, the monies derived from the ceded strip would have been distributed to the State. Id. at 746 n.9, 748-49. It is, therefore, totally disingenuous for appellant EMD to suggest

11/ The Indian tribe, however, would not receive 50 percent of the monies collected. Rather, OSMRE was holding those funds in escrow pending a congressional clarification of regulatory jurisdiction over Indian lands. Id. at 743.

that the court did not find that the ceded strip was "Indian lands" within the meaning of 30 U.S.C. | 1291(9) (1982). 12/

More critically, the substantive conclusion of the court was premised on an analysis of the State's authority under SMCRA to control reclamation activities on non-reservation Indian lands. Through an analysis of the interplay between 30 U.S.C. || 1232(g)(2), 1235 (1982), and the definitional provisions of section 1291(9), (11), and (25) (1982), the court concluded that "given Congress' clear intent to deprive the states of reclamation authority over non-reservation Indian lands, we find it inconceivable that Congress wished states to benefit from funds derived from those areas." Id. at 752. Thus, the court's declaration that "the overwhelming evidence suggests Congress' desire temporarily to postpone determining the locus of regulatory authority over all lands in which the Indians have an interest," is not, as EMD would have it, mere dictum irrelevant to the issues before the Board. Quite the opposite. The court's observation was an essential predicate to its ultimate holding, brightly illuminating the scope and ambit of the statutory language found at 30 U.S.C. | 1291(9) (1982) and directly germane to the issues presented in this appeal.

Thus, the court in Montana v. Clark, supra, broadly read the language of 30 U.S.C. | 1291(9) (1982) as covering "all lands in which the Indians

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12/ Moreover, since the court expressly eschewed examining the Crow Tribe's allegation that the ceded strip was properly deemed to be a "reservation" (see 749 F.2d at 743 n.5), its decision necessarily rests on the conclusion that the reserved mineral estate was sufficient, by itself, to render the land "held in trust for or supervised by an Indian tribe." This, of course,
totally refutes EMD's other argument that this statutory provision only applies when both the surface fee and the mineral estates are conjoined. See EMD SOR at 16.

have an interest." It is, of course, unnecessary for this Board to embrace this expansive reading in order to sustain the decision of OSMRE. Rather than asserting that all lands in which an Indian tribe had an interest were within the scope of the statutory definition, OSMRE's holding in the pre-sent case is that, because the Navajo Tribe owns the surface estate in fee, it necessarily "supervised" the land within the meaning of the statutory definition. We think that this interpretation is in accord with the relevant legislative history and is supported by the decision in Montana v. Clark.

We recognize, however, an inherent inconsistency between the analysis of the Director of the Albuquerque Field Office and the position espoused

by the Assistant Director of the Western Region with respect to the ques-tion of supervision in fact. Clearly, the Assistant Director was of the view that unless tribal fee lands were actually "supervised" by a tribe they could not be deemed "Indian lands" within the contemplation of SMCRA. It was, no doubt, a direct result of this expression of concern which led the Albuquerque Director to analyze Valencia's argument that, even though the Navajo Tribe held the surface fee estate, the Tribe did not exercise supervision over the land. While we believe that the Albuquerque Director's analysis provided more than a sufficient basis upon which to find that the Navajo Tribe did exercise supervision in fact, we are also of the view that supervision in law, i.e., mere ownership of the surface fee, was sufficient,

in and of itself, to compel the conclusion that the lands at issue were "Indian lands" subject to the Federal Program for Indian Lands. 13/

13/ We recognize that it is theoretically possible that the situation could present itself where lands for which an Indian tribe has no ownership

Both EMD and Valencia argue that an interpretation which results in an assertion of OSMRE jurisdiction via the Federal Program for Indian Lands over the subject lands runs afoul of the expressed congressional intent to avoid altering the jurisdictional status quo. In point of fact, however, nothing in our decision alters the jurisdictional status quo. Thus, in adopting SMCRA, Congress could have provided that all lands in which a tribe owned any interest would be subject to the tribe's regulatory jurisdiction of surface mining activities under an approved program. Or, alternatively, Congress could have provided that some of those lands would be so subject. What Congress chose to do was to put off this decision to a future date and provide for a study of the question of regulation of surface coal mining activities on Indian lands. See 30 U.S.C. | 1300(a) (1982). To effectuate this intent, Congress sought to place "Indian lands" in a jurisdictional limbo for purposes of SMCRA, outside the scope of both the Federal lands program and any approved state program.

The position of Valencia and EMD proceeds from the assumption that, to the extent that any parcel of land was subject to a state's general regulatory or police powers prior to adoption of SMCRA, it must be subject to the state's regulatory authority under SMCRA if the Act is not to alter the jurisdictional status quo. The essential fallacy of this position is that SMCRA is, itself, an assertion of Federal authority under the Commerce Clause to regulate all surface coal mining activities within the individual

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fn. 13 (continued)
interest in either the surface or the mineral estate might be said to be subject to the Tribe's "supervision" in fact. Whether this would be sufficient to classify the lands in question as "Indian lands" under SMCRA we need not determine at the present time.

States. See Hodel v. Virginia Surface Mining & Recl. Assn, 452 U.S. 264 (1981). Admittedly, the Act provided express mechanisms by which a state could achieve primary enforcement authority within the state, but such primacy is expressly limited by its terms to non-Federal, non-Indian lands within the state. That Congress so limited the assumption of state pri- macy did not change the jurisdictional status quo with respect to any lands within the State. Rather, it established the jurisdictional status quo, for the elementary reason that, until SMCRA was adopted, no entity had jurisdictional authority under its provisions.

Nor does the fact that states may not exercise authority under SMCRA to regulate coal surface mining operations on certain lands within the state determine or even affect the exercise of state jurisdiction on such lands pursuant to other authority. Thus, the fact that the land may not be "Indian country" for the purposes of state criminal jurisdiction is simply irrelevant to the question of whether these lands are properly deemed "Indian lands" for the purposes of SMCRA.

Based on the foregoing, we conclude that, where an Indian tribe owns either the mineral estate or the surface in fee of any land outside of the exterior boundaries of an Indian Reservation, such land is "supervised by an Indian tribe" within the meaning of 30 U.S.C. | 1291(9) (1982) and is properly subject to the Federal Program for Indian Lands established in 30 CFR Part 750. In light of this conclusion, we need not reach the

argument advanced by the Navajo Tribe that the subject land lies within the undiminished exterior boundaries of the Navajo Reservation. 14/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

James L. Burski
Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member

14/ Since we have modified the decision of the Albuquerque Director to the extent it could be construed to hold that supervision in fact is the determinate factor in whether an Indian tribe "supervises" land, there remains no issue of fact which might be explored at a fact-finding hearing. Accordingly, EMD's request that the case be referred to the Hearings Division under 43 CFR 4.415 is hereby denied. See Marie M. Bunn, 100 IBLA 1 (1987).